IN THE

Supreme Court of the United States

No. 75-1762.

LAWRENCE M. KLEMOW,

Petitioner,

v.

TIME INCORPORATED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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2. Whether, even if footnote 15 of the opinion of the Pennsylvania Supreme Court in this matter is a final judgment from which a writ of certiorari could lie, there exists an adequate, independent nonfederal ground for the result reached in footnote 15 of the opinion of the Pennsylvania Supreme Court.

3. Whether the Pennsylvania Supreme Court correctly determined that "because the jurisdiction of the courts of the Commonwealth is territorially limited, the class may consist only of Pennsylvania residents."

4. Whether footnote 15 of the opinion of the Pennsylvania Supreme Court implicates to any extent the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution in that non-residents of Pennsylvania are specifically given the opportunity to submit voluntarily to the jurisdiction of a Pennsylvania court.

RULE INVOLVED.

Rule 2230 Pennsylvania Rules of Civil Procedure.

> (a) If persons constituting a class are so numerous as to make it impracticable to join all as parties, any one or more of them who will adequately represent the interest of all may sue or be sued on behalf of all, but the judgment entered in such action shall not impose personal liability upon anyone not a party thereto.
>
> (b) An action brought on behalf of a class shall not be dismissed, discontinued, or compromised nor shall a voluntary nonsuit be entered therein without the approval of the court in which the action is pending.

COUNTERSTATEMENT OF THE CASE.

On December 8, 1972, after having sustained a cumulative loss in excess of $30 million over the previous four years, and anticipating a loss in excess of $10 million during the next year if LIFE Magazine were to continue to be published, Time Incorporated ("Time Inc."), respondent herein, announced the suspension of publication of LIFE Magazine.

Procedural History.

Within three days of the announcement, Lawrence M. Klemow ("Klemow"), petitioner herein, commenced an action in equity in the Court of Common Pleas of Luzerne County, Pennsylvania, purporting to represent a class in excess of five million "subscribers" to LIFE, seeking, *inter alia*, a mandatory injunction compelling Time Inc. to continue publishing LIFE Magazine for the duration of any and all subscriptions for LIFE Magazine. Subsequent to Time Inc.'s filing preliminary objections to the complaint pursuant to Rule 1017 of the Pennsylvania Rules of Civil Procedure, Klemow filed his first amended complaint. Time Inc. again filed preliminary objections, and at argument on the preliminary objections, Klemow offered, and leave was granted, to amend a second time.

In the second amended complaint, Klemow purported to represent himself and a class consisting of all persons who had unexpired subscription contracts with Time Inc. The second amended complaint no longer sought an injunction prohibiting Time Inc. from discontinuing publication of LIFE until all subscription contracts had expired, but claimed to be brought in equity by seeking a "complicated accounting." Once more, Time Inc. filed preliminary objections asserting that Klemow had an ade-

quate remedy at law and that no proper class action was stated pursuant to Pennsylvania practice.

After Time Inc.'s preliminary objections were briefed and argued, the Court of Common Pleas directed a variety of interrogatories to both parties probing both factual and legal questions raised with regard to the propriety of a class action. In response to the Court's designated question No. 12 relating to the jurisdiction of the Court of Common Pleas of Luzerne County, Pennsylvania, Time Inc. noted that because the jurisdiction of a state court is territorially limited, the Court of Common Pleas would have jurisdiction only over Pennsylvania residents, and that the Court did not have power to bind an individual having absolutely no contact with the Commonwealth of Pennsylvania.

On June 28, 1974, Time Inc.'s preliminary objections were sustained both in respect of the class action and the adequacy of Klemow's individual remedy at law. Because the Court simply dismissed all class action aspects of the complaint, the Court of Common Pleas never dealt with the question whether its jurisdiction properly extended beyond the borders of Pennsylvania, nor was that question ever posed directly by either party in the Court below.

On appeal to the Pennsylvania Supreme Court, Klemow did not press the issue raised here for the reason that the Court of Common Pleas had not premised its dismissal of his case on any concept of territorial limitation other than to note that forums other than the Court of Common Pleas of Luzerne County, Pennsylvania, appeared to be more convenient for Klemow's law suit. As appellee in the Pennsylvania Supreme Court, Time Inc., of course, urged all potential grounds for affirming the order of the Court of Common Pleas that class action treatment was inappropriate. Among others, Time Inc. asserted that a class action under Pennsylvania procedure would be improper in this case because a class action would not yield material benefit to the members of the purported class and because common law fraud allegations do not form a proper basis for a class action. Finally, Time Inc. contended that dismissal of the class action should be affirmed in that the Court of Common Pleas of Luzerne County, Pennsylvania, was not the proper forum for the nationwide class purported to be represented by Klemow. Time Inc.'s argument centered on the due process limitation inherent in a state court's attempted exercise of jurisdiction over nonparties having no meaningful contacts with Pennsylvania.

The Pennsylvania Supreme Court vacated the decision of the Court of Common Pleas on two grounds:

1. The Pennsylvania Supreme Court held that under Pennsylvania practice, it is improper to dismiss a case originally brought in equity on the basis that an adequate remedy at law exists; rather, proper practice is to transfer the case from equity to law; and

2. The Pennsylvania Supreme Court held that it was improper under Pennsylvania practice for the Court of Common Pleas to have resolved an issue of damages and thus the class action question based only on the existence of a complaint and preliminary objections.

The Pennsylvania Supreme Court vacated the decision below, and remanded the matter for further proceedings pursuant to which plaintiff would be permitted to file an amended complaint on the law side, and would be permitted "an opportunity to sustain his burden that the case is properly maintainable as a class action." (A6).

Because plaintiff never sought a stay in either the Pennsylvania Supreme Court or this Court, and because his application to the Court of Common Pleas of Luzerne County for a stay was properly denied, the matter is presently proceeding in the Court of Common Pleas of Luzerne County; plaintiff has engaged in pre-complaint discovery pursuant to Pennsylvania practice, and plaintiff's amended complaint is due to be filed on June 30, 1976.

Implementation of the Suspension of Publication of LIFE Magazine.

Although the mechanics of the suspension of publication of LIFE Magazine do not directly relate to the Petition for a Writ of Certiorari filed herein, a brief description of the process is necessary in light of certain misleading statements contained in the Petition.

Shortly after the suspension of publication with LIFE's December 29, 1972 issue, everyone who purchased subscriptions to LIFE from Time Inc. which were in force at the time of the suspension of publication was offered either a cash refund, a choice of magazines, or a book in substitution for the remaining issues of LIFE due under his subscription. Anticipating that not all these subscribers would respond to the first solicitation, a second mailing was prepared and sent to those subscribers who had not noted an affirmative choice as of the date of the mailing of the second solicitation. The second solicitation noted that if an affirmative response was not received within a reasonable time, Time Inc. would substitute a magazine of its choice to satisfy the remaining portion of any nonrespondent's subscription. At the present time, virtually every subscriber of LIFE Magazine at the time of its suspension (with the exception of Klemow) has received and accepted either a cash refund, a substitute magazine or a book.

ARGUMENT.

Footnote 15 of the Opinion of the Pennsylvania Supreme Court in This Matter Does Not Constitute a Final Judgment Within the Meaning of 28 U. S. C. § 1257(3).

This Court's certiorari jurisdiction is limited by statute to consideration of final judgments. 28 U. S. C. § 1257(3). Because the Court must first determine its jurisdiction before reaching the merits, it is appropriate initially to analyze the Opinion of the Pennsylvania Supreme Court to decide whether it constitutes a final judgment within the meaning of 28 U. S. C. § 1257(3) from which a writ of certiorari could lie.

Pursuant to the Order of the Pennsylvania Supreme Court, this case has been remanded to the Court of Common Pleas of Luzerne County where plaintiff now has the opportunity to file yet another amended complaint and to attempt to plead a class action within the parameters of Pennsylvania procedure. No answer to a complaint has been filed in the three and one-half years during which this case has proceeded. The amended complaint to be filed is subject to preliminary objections under Pennsylvania practice. Thus, far from being final, this case has just begun. Based on present posture alone, one would be tempted to conclude that this case cannot give rise to a final judgment subject to the jurisdiction of this Court.

More substantively, however, when the issue from which certiorari is sought is compared with the judgment of the Pennsylvania Supreme Court, it can be seen that footnote 15 of the Opinion limiting any future class to Pennsylvania residents was not necessary to the judgment. To that extent, footnote 15 constitutes dictum, or at best precatory language, and cannot constitute a final judgment within the meaning of 28 U. S. C. § 1257(3) from which a writ of certiorari could lie.

Moreover, the nonfinal nature of footnote 15 is exemplified by the conditional nature of plaintiff's status as a purported class representative. If the Pennsylvania Supreme Court had held that Klemow stated a proper class action under Pennsylvania procedure but that the class could not include non-residents of Pennsylvania, the due process issue sought to be raised might then be in a posture from which this Court could exercise its certiorari jurisdiction. In this case, however, Klemow has not yet been found to have stated any class action, let alone one limited solely to Pennsylvania residents. Thus, it is likely that on remand Time Inc. will file preliminary objections to Klemow's anticipated amended complaint challenging the propriety of any class Klemow purports to represent. If, at that time, the Court of Common Pleas holds that no class action is proper under the facts of this case, then, the question whether a Pennsylvania state court class action must comprehend non-residents will never have to be decided in this case. It is additionally possible that Klemow might be certified as a representative of a class limited to Pennsylvania residents as a matter solely of Pennsylvania procedure, in which case the federal question claimed to be raised here would not require decision. Apparent from this scenario is the fact that the issue sought to be presented here may be mooted by the further proceedings under Pennsylvania procedure.

Whether the due process question will ever have to be addressed in this case, thus, becomes problematical at best and hypothetical at the least. A judgment subject to uncertain future applicability such as footnote 15 cannot be final within the meaning of 28 U. S. C. § 1257(3).

> "Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, § 237, 28 U. S. C. § 344. Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market St. Ry. Co. v. Comm.*, 324 U. S. 548, 551 (1945); *See also Costarelli v. Massachusetts*, 421 U. S. 193, 196 (1975).

Mr. Justice Frankfurter stressed the importance of maintaining firmly the concept of finality in *Radio Station WOW v. Johnson*, 326 U. S. 120, 124 (1945):

> "This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' § 237 of the Judicial Code, 28 U. S. C. § 344(a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."

Judged by the standards enunciated above, footnote 15 is not sufficient to confer certiorari jurisdiction on this Court.

Footnote 15 itself can have no effect on the ultimate outcome of the litigation. Klemow has his individual action against Time Inc. without regard to the existence of a nationwide class, and similarly, the question whether Klemow is entitled to represent any class will be answered without regard to the geographical composition of the purported class. The finality issue presented here, thus, is distinguishable from cases such as *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469 (1975), and *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U. S. 156 (1974), in that the questions raised there either determined the outcome of the case [1] or would be irretrievably lost.[2] Neither result is possible here. As noted, this litigation will proceed regardless of the composition of any potential class, and Klemow will have no less standing later to raise the due process issue than he has now. Thus, because footnote 15 of the Opinion of the Pennsylvania Supreme Court cannot constitute a final judgment, the Petition for a Writ of Certiorari should be denied.

Even if Footnote 15 Constitutes a Final Judgment Within the Meaning of 28 U. S. C. § 1257(3), There Exists an Adequate Independent Nonfederal Ground for Decision Over Which This Court Does Not Have Jurisdiction.

Based on the posture in which this matter was appealed to the Pennsylvania Supreme Court, neither party "raised" the question of territorial restriction. Klemow did not because the Court of Common Pleas had not based

1. A decision in favor of the petitioner in *Cox Broadcasting* would have totally obviated the necessity for a trial.

2. Under North Dakota procedure, the Pharmacy Board was not permitted to appeal from its own orders. Thus, removal of the constitutional issue from Board consideration assured that the issue could never be raised again. *North Dakota State Bd. of Pharmacy*, 414 U. S. at 163.

its class action decision on any concept of territoriality. And Time Inc. did not in that the two pages devoted to the issue in its brief in the Pennsylvania Supreme Court do nothing more than suggest an additional basis for a finding of unmanageability of any nationwide class that might have been designated. Because neither party focused on the constitutional issue involved in the territoriality question, it is understandable that the Pennsylvania Supreme Court's holding was simply that "Because the jurisdiction of the courts of the Commonwealth is territorially limited, the class may consist only of Pennsylvania residents." (A7).

It is impossible to determine from the remainder of footnote 15 of the Opinion whether the statement quoted above is based on the United States Constitution, the Pennsylvania Constitution, a combination of both, or whether in fact, the statement was made in the Court's role as the ultimate supervisor of Pennsylvania practice and procedure. The citation to decisions of this Court would indicate some reliance on the federal Constitution. On the other hand, reliance on earlier Pennsylvania Supreme Court decisions may lead to the conclusion that footnote 15 is based on a reading of Article 1, § 11 of the Pennsylvania Constitution or an interpretation of the common law territorial limitation on the jurisdiction of a forum. Finally, the Court may have referred to prior case law solely for the purpose of providing background for its exercising its general supervisory and administrative authority [3] in issuing class action guidelines, a task it has

3. The Pennsylvania Supreme Court's supervisory power derives from Article 5, § 10(a) of the Pennsylvania Constitution:

> "The Supreme Court shall exercise general supervisory and administrative authority over all courts and justices of the peace, including authority to temporarily assign judges and justices of the peace from one court or district to another as it deems appropriate."

recently undertaken with some frequency. *See, e.g., McMonagle v. Allstate Ins. Co.*, — Pa. —, 331 A. 2d 467 (1975); *Buchanan v. Brentwood Federal Savings & Loan Assn.*, 457 Pa. 135, 320 A. 2d 117 (1974); *Luitweiler v. Northchester Corp.*, 456 Pa. 530, 319 A. 2d 899 (1974).

Were the Pennsylvania Supreme Court exercising its general supervisory powers or interpreting the Pennsylvania Constitution or common law in footnote 15 (and there is nothing in the record or the Court's opinion to indicate otherwise), the Court's determination that a Pennsylvania state court class action should be limited to Pennsylvania residents and those non-residents voluntarily submitting themselves to Pennsylvania's jurisdiction, is a holding of state law only, and is not reviewable in this Court. *See, e.g., Jankovich v. Indiana Toll Road Comm.*, 379 U. S. 487 (1965); *Black v. Cutter Laboratories*, 351 U. S. 292 (1956); *Durley v. Mayo*, 351 U. S. 277 (1956); *Stembridge v. Georgia*, 343 U. S. 541 (1952); *Klinger v. Missouri*, 13 Wall. 257 (U. S. 1871). As noted by Justice White in *Jankovich, supra*, 379 U. S. at 489:

> "It is undoubtedly '"the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U. S. 207, 210.' *Cramp v. Board of Public Instruction*, 368 U. S. 278, 281."

In light of the substantial likelihood that an adequate independent state ground formed the basis for footnote 15 of the Pennsylvania Supreme Court's Opinion, the Petition for a Writ of Certiorari should be denied.

Even if Footnote 15 of the Pennsylvania Supreme Court's Opinion Is Found to Constitute a Final Judgment Based Solely on an Interpretation of Federal Law, the Pennsylvania Supreme Court Correctly Held That "the Class May Consist Only of Pennsylvania Residents."

Although respondent believes that sufficient grounds have been presented for denial of the Petition for a Writ of Certiorari, it is necessary briefly to address the merits of footnote 15 of the Opinion of the Pennsylvania Supreme Court in this matter, to highlight the correctness of the decision below.

Stated simply, if this issue is reached, the question is whether the due process clause of the Fourteenth Amendment to the United States Constitution permits a state court to exercise jurisdiction over non-residents having no contacts of any sort with the forum state. Of the millions of former subscribers to LIFE Magazine located throughout the world, many, if not most, have never set foot within the Commonwealth of Pennsylvania and have never had any contact of any sort with Pennsylvania. A Pennsylvania state court does not have jurisdiction to bind such persons, and, as such, a Pennsylvania class action may consist properly only of Pennsylvania residents and those non-residents who submit to Pennsylvania's jurisdiction.

The decisions of this Court are clear that before a person may be bound by a state court judgment, that individual must have had certain minimum contacts with the forum, and that such a rule is "a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U. S. 235, 251 (1958); *Pennoyer v. Neff*, 95 U. S. 714 (1877).

Even though the rather inflexible rule stated in *Pennoyer* has been modified by cases such as *Hanson v. Denckla, supra; McGee v. International Life Ins. Co.*, 355

U. S. 220 (1957); and *International Shoe Co. v. Washington*, 326 U. S. 310 (1945), this Court has not abandoned the concept of territorially limited state judicial power. Nor has this Court sought to distinguish between defendants and plaintiffs in the application of due process requirements. *See Pennoyer v. Neff*, 95 U. S. at 722-23.

Although Klemow might argue that the sending of notice can cure any due process defect created by attempting to proceed with a nationwide class action in a state court, the decisions of this Court do not support that result, and in fact such decisions recognize the inherent inability of a state court to bind non-residents having no contacts with the forum regardless of notice. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950); *Hansberry v. Lee*, 311 U. S. 32 (1940).

The inexorable conclusion is that the mere denomination of an action as a class suit cannot eradicate the territorial limitation on the jurisdiction of a state court. *Note, Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers*, 18 U. C. L. A. L. Rev. 1002, 1012 (1971) ["However, one thing is clear a state court does not have jurisdiction over, and therefore cannot bind, a non-resident individual 'with which the state has no contacts, ties or relations.' "].

Because the Pennsylvania Supreme Court correctly determined in footnote 15 of its Opinion that Pennsylvania class actions should be limited to Pennsylvania residents and those non-residents who voluntarily submit to Pennsylvania's jurisdiction, the Petition for Writ of Certiorari should be denied.

By Stating That a Pennsylvania Class Action "May Consist Only of Pennsylvania Residents," and That "the Class May Also Include Non-Residents Who Submit Themselves to the Jurisdiction of the State Courts," the Pennsylvania Supreme Court in No Way Implicated the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution.

Although petitioner includes in his statement of questions presented for review one concerning the Privileges and Immunities Clause of the United States Constitution, Klemow offers no argument on the matter, and cites no authority. The only reference in the petition to this issue is a citation to an *amicus* brief filed in the Pennsylvania Supreme Court on behalf of Klemow. There, however, the totality of the argument presented in relation to the Privileges and Immunities Clause consisted of footnote 3 at page 23 of the brief, quoted in full below:

> "*Exclusion* of non-residents from the class solely on the ground of their non-residency may be an unconstitutional discrimination against non-residents with respect to access to this State's courts, in violation of the Privileges and Immunities Clause of the United States Constitution. *See Rejsenhoff v. Colonial Navigation Co.*, 35 F. Supp. 577, 579 (S. D. N. Y. 1940)." (emphasis added).

Thus, Klemow no doubt misread footnote 15 of the Pennsylvania Supreme Court's Opinion, because footnote 15 does not exclude non-residents from the class; rather, footnote 15 makes Pennsylvania's courts available to all non-residents voluntarily submitting to Pennsylvania's jurisdiction.

Because Klemow apparently does not seriously raise the Privileges and Immunities issue, the Petition for a Writ of Certiorari should not be granted on this question.

CONCLUSION.

In light of the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania should be denied.

Respectfully submitted,

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